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SYMPOSIUM: "LAW &": PHILOSOPHICAL, PSYCHOLOGICAL, LINGUISTIC, AND BIOLOGICAL PERSPECTIVES ON LEGAL SCHOLARSHIP

SYMPOSIUM EDITOR
CLAIRE HILL

FOREWORD *Micah Thorner* 849

I. LAW AND LANGUAGE

PERNICIOUS AMBIGUITY IN CONTRACTS
AND STATUTES *Lawrence M. Solan* 859

This Article explores pernicious ambiguity, an interpretive problem that is not adequately acknowledged by the legal system. Pernicious ambiguity occurs when the various actors involved in a dispute all believe a text to be clear, but assign different meanings to it. Depending upon how the legal system handles this situation, a case with pernicious ambiguity can easily become a crapshoot. If the judge does not take heed of the competing interpretations as reflecting a lack of clarity, and if that judge happens to understand the document in a way helpful to a particular party, that party wins. Because the document is not seen as ambiguous, the document is declared clear. In reality, however, the document is even less clear than are ambiguous documents. The competing interpretations reflect a complete communicative breakdown. If language worked so poorly generally, it would not be possible to have a language-driven rule of law at all.

The problem, perhaps ironically, is that the concept of ambiguity is itself perniciously ambiguous. People do not always use the term in the same way, and the differences often appear to go unnoticed. While all agree that ambiguity occurs when language is reasonably susceptible to different interpretations, people seem to differ with respect to whether those interpretations have to be available to a single person, or whether ambiguity occurs when different speakers of the language do not understand a particular passage the same way. Often, courts even ignore disagreement among judges as irrelevant to whether a document is clear on its face. This Article will show how these different notions of ambiguity emerge, and offer some explanations based on advances in linguistics, cognitive psychology, and the philosophy of language. Examples are taken from cases concerning the interpretation of statutes, contracts, and insurance policies.

German business contracts are much shorter than their American counterparts. They also avoid the worst excesses of legalese that American contracts are known for. But they seem to work as well as United States contracts. We seek to understand how German business contracts could do as much with fewer words. Our explanation is predicated on an account of what contracting does. Contracting aims to create a bigger transactional pie in a world where parties' incentives are misaligned and they need to coordinate the production of information, specify future rights, duties and procedures, and allocate risks. The task of contracting thus has both adversarial and non-adversarial components. The German system permits considerable economies in the adversarial sphere; the economies extend to the non-adversarial sphere as well. The economies take the form of a reduction in transaction costs: transaction documents in Germany are far less custom-tailored to particular parties and their transaction than they are in the United States. Yet parties are not sacrificing much in the way of "getting the deal they want." This is because much custom-tailoring in the U.S. reflects (a) a costly attempt to constrain opportunism using contract language, and (b) a failure to create and accept "good enough" solutions to non-adversarial (and some adversarial) issues parties commonly face. We argue that German contracting does better on both these fronts. It does better at constraining opportunism more cheaply, by cutting short the "arms race" in which U.S. transacting parties and their lawyers too often engage in their negotiation and drafting of contracts. It also does better at creating and using "good enough" standardized solutions to common non-adversarial (and some adversarial) issues. But the German system has its costs. Parties may indeed compromise somewhat on getting, or at least specifying, "exactly the deal they want." And, more importantly, the German system may ultimately be unsustainable: The arms race in customizing contract provisions may be impossible to constrain in the more diffuse transactional community that European integration and globalization are bringing about; with enough customization, the benefits to using and developing standardized provisions diminish greatly.

DID CLINTON LIE?:

DEFINING "SEXUAL RELATIONS"

Peter Tiersma 927

With the impeachment proceedings against President Clinton now well behind us, we can step back and consider the matter somewhat more dispassionately. The focus of the impeachment hearings was that Clinton perjured himself and engaged in obstruction of justice. I limit my observations to the question of whether he committed perjury, and in particular, whether he lied when he denied having a sexual relationship with a White House intern, Monica Lewinsky.

When Clinton was first asked during a deposition whether he had ever had an "affair" or "sexual relationship" with Lewinsky, he quite explicitly denied it. He was asked about his denials during a second legal proceeding—his testimony before a grand jury—when he was again placed under oath. Clinton insisted that his denials were true based on the ordinary understanding of these terms. In other words, he appealed to usage of that phrase in the speech community. His lawyers during the impeachment made similar arguments on the basis of dictionary definitions. Because there seems to be a great deal of variation in how people use this phrase, I will argue that Clinton's defenders were largely correct on this point.

The lawyers examining the president were obviously aware of the dangers of using such a slippery term, so they introduced a definition of "sexual relations" into evidence during the deposition and then asked Clinton whether, under that rather convoluted definition, he had engaged in "sexual relations" with Lewinsky. Clinton again denied having done so, but was later forced to admit to at least some sexual activity with the former intern. During the subsequent grand jury proceedings he was also interrogated on his denials of having "sexual relations," as defined. His defense consisted of an extremely literalistic dissection of the words of the definition. I will suggest that a large part of the problem is that the definition had largely been textualized. A result of textualization is that the resulting text invites a very literal and sometimes even hypertechnical interpretation, and Clinton was only too happy to comply.

This Article examines a characteristic of legal language that leads to unexpected and potentially harmful distortions of legal knowledge. It describes how authority heuristics distort knowledge about law in foreign legal systems. The concept of authority heuristics refers to assumptions about authority that are imbedded in cognition. The Article argues that where a legal professional in one system relies on authoritative language in another legal system, she is likely to apply authority heuristics from her own system and to that extent misinterpret information that she receives from the foreign system. The same language that provides valuable information when used by those within a system turns out to provide a distorted image when used by those outside the system. In general, therefore, the capacity of authoritative language to accurately convey information within a legal system tends to be inversely related to its capacity to create accurate knowledge for those outside the system. The Article analyzes how legal language creates this unexpected result, identifies some of the consequences of this previously unnoticed feature of legal language, and suggests means of reducing its potentially harmful consequences.

II. LAW AND PSYCHOLOGY, ECONOMICS, AND BIOLOGY

FEAR ASSESSMENT: COST-BENEFIT ANALYSIS AND THE PRICING OF FEAR AND ANXIETY

Matthew D. Adler 977

Risk assessment is now a common feature of regulatory practice, but fear assessment is not. In particular, environmental, health and safety agencies such as EPA, FDA, OSHA, NHTSA, and CPSC, commonly count death, illness, and injury as costs for purposes of cost-benefit analysis, but almost never incorporate fear, anxiety, or other welfare-reducing mental states into the analysis. This is puzzling, since fear and anxiety are welfare setbacks, and since the very hazards regulated by these agencies—air or water pollutants, toxic waste dumps, food additives and contaminants, workplace toxins and safety threats, automobiles, dangerous consumer products, radiation, and so on—are often the focus of popular fears. Even more puzzling is the virtual absence of economics scholarship on the pricing of fear and anxiety, by contrast with the vast literature in environmental economics on pricing other intangible benefits such as the existence of species, wilderness preservation, the enjoyment of hunters and fishermen, and good visibility, and the large literature in health economics on pricing health states.

This Article makes the case for fear assessment, and explains in detail how fear and anxiety should be quantified and monetized as part of a formal, regulatory cost-benefit analysis. The author proposes, concretely, that the methodology currently used to quantify and monetize light physical morbidities, such as headaches, coughs, sneezes, nausea, or shortness of breath, should be extended to fear. The change in total fear-days resulting from regulatory intervention to remove or mitigate some hazard—like the change in total headache-days, cough-days, etc.—should be predicted and then monetized at a standard dollar cost per fear-day determined using contingent-valuation interviews.

APOLOGY AND THICK TRUST: WHAT SPOUSE ABUSERS AND NEGLIGENT DOCTORS MIGHT HAVE IN COMMON

Erin Ann O'Hara 1055

This Article argues that an evolutionary analysis of the role of apology in human interactions helps us to identify contexts where victims are prone to excessively forgive wrongdoing. The Article explores two of those contexts—spouse abuse and medical malpractice—and begins to explore ways that the law does and should attempt to counteract the negative effects of excessive forgiveness.

III. LAW AND PHILOSOPHY

RIGHTS, RATIONALITY, AND THE PREEMPTION OF REASONS

Richard Warner 1091

This Article rejects the following Comparative Conception of rationality: namely, an action is rational only if it can be justified by showing that the reasons for it are better than (or at least as good as) the reasons against it. The Comparative Conception is inconsistent with moral rights, at least on one widespread understanding of such rights. The incommensurability of reasons is the key both to seeing why the Comparative Conception is false and to understanding the kinds of constraints on action moral rights impose.

VALUING INSIDE KNOWLEDGE: POLICE INFILTRATION AS A PROBLEM FOR THE LAW OF EVIDENCE

Jacqueline E. Ross 1111

It is well-known that undercover investigations influence and sometimes distort the crimes they seek to expose. This is the problem which the entrapment defense is designed to address. What has not yet been recognized, however, is that the investigator's influence on crimes is also a problem of evidence. This Article notes that undercover policing can be used to prove crimes that the investigator influences (which I term "contrived offenses") as well as crimes that occur independently of the government's intervention (what I call "independent crimes"). The ease of documenting the former tempts investigators to forego the arduous task of proving the latter. Yet the same evidence that proves a contrived offense may also corroborate an independent crime. This Article argues that contrived offenses are at best proxies for the independent crimes which legitimate the investigation. And because of the investigator's influence, contrived offenses are inherently flawed substitutes for independent crimes. Invoking best evidence principles, this Article argues that the rules of evidence should be reformed in ways that will motivate prosecutors to put evidence of contrived offenses to its best use: proving independent crimes.

COMMON KNOWLEDGE, COMMUNICATION, AND PUBLIC REASON

Bruce Chapman 1151

In this Article I explain why game theory has been so unsuccessful in accounting for the role of language in social interaction. I begin by exploring some of its most basic difficulties in this respect, in games of pure coordination, and trace these difficulties back to the most fundamental organizing concepts in the theory of games, namely, Nash equilibrium and common knowledge of rationality. Nash thinkers and Nash actors, I argue, are doomed to have very impoverished conversations as Nash talkers. The sorts of conversations they will have will leave them paralyzed in games of pure coordination and largely uncooperative in games where their interactions are at least partially characterized by conflicts of interest. These conversations are impoverished because they attempt to forge only a causal connection across the verbal exchanges between rational actors, not a conceptual one. What is needed is the richer sort of conversation that is idealized by law, that is, one where there is an interpenetration of concepts and commitments in the use of language between rational actors, the sort of thing we see under a truly shared or public reason. Law's reasonable thinkers, I argue, are more capable of coordinating, and law's reasonable talkers more capable of cooperating, than their Nash counterparts because, under objective reasonableness, they are committed to a more public conception of their conduct shaping what they do together.

IV. LAW AND PSYCHOLOGY

REFLECTIONS OF A RECOVERING LAWYER: HOW BECOMING A COGNITIVE PSYCHOLOGIST—AND (IN PARTICULAR) STUDYING ANALOGICAL AND CAUSAL REASONING— CHANGED MY VIEWS ABOUT THE FIELD OF PSYCHOLOGY AND LAW

Barbara A. Spellman 1187

In the field known as Psychology and Law (which may be different from the field known as Law and Psychology), a small number of topics have stimulated the overwhelming majority of research. However, the topics available for psychology and law inquiry are infinite—limited only by the experience and imaginations of the researchers. I describe several areas of basic research in cognitive and social psychology that I, my colleagues, and my students, have been involved in during the past dozen years and demonstrate how they can be applied to the law. The major areas include: analogical reasoning—relevant to legal training and the use of precedent in judicial reasoning and legal scholarship; and causal and counterfactual reasoning—relevant to judges' and juries' decisions in most criminal and civil actions. I briefly mention research on hypothesis testing, metacognition, and memory inhibition. Several current "hot topics" in cognitive and social psychology are also ripe for more interdisciplinary research including: aging, information displays (including virtual reality), affective forecasting, implicit attitude formation and use, and stereotyping.

WHAT'S WRONG WITH HARMLESS THEORIES OF PUNISHMENT

Kenworthy Bilz 1215
and John M. Darley

We maintain that conventional punishment theories obscure what is virtually always at the heart of punishment policy debates: harm. Namely, punishment policy disputes reflect contested views about what the harms inflicted by crime are as an empirical matter, and whether these harms ought to be acknowledged by the criminal justice regime as a normative matter. We argue that in order to know who, what, and how much to punish, one must take a position about what the harms of crime actually are. However, conventional punishment theories are mute on this question. When they supply an answer, it is because they have relied on a source outside the boundaries of their own theory to tell us why one crime is "worse" than another. We contend that discarding "harmless" theories of punishment, and instead focusing directly on competing views about the harms of crime, would clarify policy debates and open up possibilities for creative, pluralistic solutions to criminal justice problems. In addition to specifying in some detail what the harms of crime are, we offer two examples of how specific punishment policy debates would look different if they focused on harms instead of punishment theories. We also offer an illustration of a punishment policy originally motivated not by punishment theory but by a desire to explicitly address the multiple and particular harms of crime: "restorative justice."

EPILOGUE: LAW AND FABLE

THE COILED SERPENT OF ARGUMENT: REASON, AUTHORITY, AND LAW IN A TALMUDIC TALE

David Luban 1253

Perhaps the best-known story in the Talmud is the tale of the Oven of Akhnai, in which Rabbi Eliezer performs miracles to prove a contested point of law, while the other rabbis in the court reply that even a divine voice cannot overturn the vote of the majority. The surprising twists in the story raise complex issues about the nature of authority and legal objectivity, the coerciveness of logic, the political character of courts, and the ethics of argument. This Article offers several readings of the Oven of Akhnai and explores its relevance to contemporary legal theory.

STUDENT NOTES AND COMMENTS

MEDICATING TO EXECUTE:

SINGLETON v. NORRIS

Michelle L. Brunsvold 1291

Can a state, without violating due process or the Eighth Amendment, forcibly medicate a mentally ill inmate when the medication would render the inmate competent to be executed? The Eighth Circuit has held that due process is not violated so long as the state shows that there is an essential state interest that outweighs the inmate's interest in remaining free from the medication, that there are no less intrusive measures by which to accomplish the state interest, and that the medication is in the inmate's best medical interest. This Comment argues that in *Singleton v. Norris*, the Eighth Circuit improperly found that the imposition of the death penalty is an essential state interest, and also was wrong to conclude that medication is in the inmate's best medical interest even though the effect of the medication will be death. The Eighth Circuit further held that executing an artificially competent inmate is not cruel and unusual punishment, reasoning that, because the state was otherwise under an obligation to administer the medication, any other effect was irrelevant. In response, this Comment argues first, that the court incorrectly equated artificial sanity with true sanity, and second, that because courts and medical professionals make mistakes in determining competency, the fact that the death penalty is involved cannot be irrelevant.

THE ANTI-COMPETITIVE EFFECTS AND ANTITRUST IMPLICATIONS OF CATEGORY MANAGEMENT AND CATEGORY CAPTAINS OF CONSUMER PRODUCTS

Leo S. Carameli, Jr. 1313

Just how do grocery stores choose what products to carry? They ask the manufacturer, of course. This Note discusses supermarket implementation of Category Management through the use of Category Captains. Category Management is a methodology by which firms can make educated decisions as to the appropriate assortment of products to carry, and the proper means to shelve, price, and promote those products. A Category Captain is a single preferred manufacturer selected by a retailer to perform Category Management work for its own and its competitors' products. This Note discusses how certain implementations of the retailer-Category Captain relationship may be anticompetitive and the related antitrust implications. Specifically, this Note addresses resale price maintenance agreements under Section 1 of the Sherman Act, unilateral anticompetitive conduct by a Category Captain under Section 2 of the Sherman Act, and price discrimination under the Robinson-Patman Act.

BEYOND *HOFFMAN PLASTIC*: REFORMING NATIONAL LABOR RELATIONS POLICY TO CONFORM TO THE IMMIGRATION REFORM AND CONTROL ACT

Shahid Haque 1357

The Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB* significantly restricted the remedies available to undocumented workers under the National Labor Relations Act. The decision highlights the tension between labor laws and immigration policy; the Court held that an undocumented worker should not recover remedies under the NLRA when employment was obtained in the first place by violating federal immigration law. This Note argues for three changes to the current system in order to fulfill the immigration policy articulated in *Hoffman* regarding undocumented workers and the remedies they may receive for wrongful employer conduct. First, the National Labor Relations Board should ascertain the immigration status of claimants *before* the Board seeks remedies on their behalf. Second, because the Board has created artificial distinctions in order to construe the *Hoffman* decision as narrowly as possible, the Board should extend the *Hoffman* reasoning to employment scenarios the Court did not have opportunity to review. Finally, in order to serve the interests of current immigration policy and balance out the removal of the backpay penalty for employer misconduct, Congress should amend the Immigration and Nationality Act to increase the penalties for violations of the Immigration Reform and Control Act.

SYMPOSIUM:

Do Children Have the Same First
Amendment Rights As Adults?

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Symposium Editor

Mackenzie Baris, Mark Gammon,
and Emily Pryor
Editorial Assistants

